

**Talk on the International Context to a Panel on Death Penalty**

**St. Joseph's Catholic Church in Capitola CA (9/6/03).**

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Want to thank organizers of forum, & say that it's a pleasure & an honor to share the platform with Father Patrick Dooling, whom I knew almost three decades ago as a brilliant young Catholic lay intellectual & teacher at Morello high school in Santa Cruz, where he was a kind colleague & friend to the lonely & unhappy Mexican immigrant woman who was then my wife. I am also proud to stand here with these outstanding activists in the struggle to put an end to capital punishment in this country.

Father Dooling's remarks remind me that one of the great mysteries to me about my beloved country has long been how it can be that so many self-proclaimed American Christians, followers of Jesus of Nazareth that teacher & unfailing practitioner of kindness, can maintain in his name their strong & steady support for state-sponsored rituals of human sacrifice – rituals that are identical in purpose & essence to the crucifixion of that same Jesus by the Roman state some 2,000 years ago. The opinion polls tell us that still today most Americans – including our own Catholic governor & our two most recent born-again Protestant presidents – are willing to accept at face value the Jerry Falwell argument about the death penalty. That's the argument that since the Bible accounts of that horrifying public execution in ancient Palestine say nothing specifically about abolishing the death penalty, today's Christians can feel right about being 100% for it.

Now every nation-state & most tribes and chiefdoms throughout human history until quite recently, have reserved & occasionally exercised the right to kill persons whom they see as representing a serious threat to the social order as their leaders define it. The

practice of judicial killing is still very widespread around the world. But to a modern reader, most of the executions recorded in history seem both horrific & unjustified. A good example is the well-known practice of the British state during several centuries of hanging prisoners for relatively small crimes against property.

The reason for this world-wide change of opinion about capital punishment is that there has been a long & hard-fought struggle against it, a struggle sustained by practical people as well as idealists in many countries. This anti-death penalty campaign has been part of a broader heroic struggle to establish & maintain an enforceable international standard for the exercise & protection of human rights. That struggle is rooted among other places in the teachings of Jesus of Nazareth himself; but it began in earnest not long after the American & French Revolutions of the 18<sup>th</sup> century which introduced the ideals of human equality, of democratic governance, & of the separation of Church from state. I won't try to review for you here the 19<sup>th</sup>-century struggles for the abolition of slavery, for recognition of the autonomous personhood of women & children, for universal suffrage, for universal public education, for the right of workers to organize & bargain collectively, or for negotiated limitations on the ferocious practice of war. But I do want to situate our present-day struggle to abolish the death penalty for you, in the broader context of the international struggle for human rights.

Where human rights are upheld & treasured & continuously refined & expanded upon today, capital punishment is in disrepute and on the wane; where human rights are little understood, given only lip service or viewed with critical detachment today, capital punishment continues to be practiced by with a self-righteous determination, & it is strongly supported by clergy & by the population that responds to its call. That truth is a bitter pill to swallow for any thinking American, & in particular any American Catholic committed to the cause of justice, because on the worldwide spectrum of attitudes & practices regarding capital punishment, it puts all of us here in this country on the side of contemporary China, or of fundamentalist Iran or authoritarian Nigeria. In this arena the United States is a backward country, rather than a world leader.

The movement for the abolition of capital punishment has its remote origins in the 18<sup>th</sup>-c. writings of Voltaire & the Italian legal theorist Cesare Beccaria,. The idea that no crimes except murder & treason deserved such extreme punishment was circulated widely in Europe after the Napoleonic Wars. Then, especially following the revolutions of 1848, many Europeans came to believe that for the state to take vengeance on an individual as punishment for any crime was to undermine its own dignity & authority. In this radically enlightened view, the purpose of a genuine system of justice was not so much to punish as to rehabilitate all offenders. The widely read fiction of Victor Hugo was influential here – especially *Les Miserables*, in which his unforgettable character Jean Valjean, was persecuted relentlessly for many years by agents of the state for a crime that would today be considered a misdemeanor. Yet Jean Valjean proved himself capable of self-transformation into an exemplary citizen in the face of incredible injustice, hardships & deprivation. One result of this changing climate of opinion was that in most European countries executions though legal became less & less frequent as the 19<sup>th</sup> & early 20<sup>th</sup> centuries progressed. By the beginning of the Second World War a few nations (the pioneers were relatively small countries: Greece, Romania, Portugal, Netherlands, Switzerland, Italy, the Scandinavian countries & Spain) had actually succeeded in abolishing the death penalty altogether.

A parallel process was occurring in newly independent Latin America during the 19<sup>th</sup> century, as the ideology of democratic liberalism triumphed over the old colonial partnership of church & state. Venezuela became the first country in the world to abolish the death penalty absolutely in 1863; & before the end of that century Colombia, Costa Rica, Guatemala, Brazil, Nicaragua had all joined the vanguard. Argentina followed in 1922, the Dominican Republic in 1924, Mexico in 1928. Today even Haiti & Paraguay have taken the leap; and I believe only Chile & Cuba still hold onto the practice of executing criminals for the most serious crimes. Latin America has joined Europe as a virtually solid block of opposition to capital punishment, & now plays a large role in international discussions of this subject. We should keep this in mind when we read of the protests by Mexico or another Latin American country, against the threatened execution of a Latin American immigrant to the United States.

The chronologies I've sketched above are misleading in two important ways: 1) because in many of these cases there had already been no executions in the countries mentioned for decades before the date of actual abolition, so a society free of the bloody practice & its cultural consequences has existed for a century or more longer than the chronology suggests; & 2) because in some other cases there has been serious backsliding from time to time, when public opinion has flip-flopped as it did in the Netherlands after World War II, or most egregiously when authoritarian regimes (such as those of Stalin in the Soviet Union, Mussolini in Italy or Franco in Spain) have either overlooked the prohibitions in everyday practice, or actually reinstated older laws allowing capital punishment. Nevertheless it should be clear that the overall trend in both Europe & Latin America over the past century and a half has decidedly been in the direction of a universal abolition of capital punishment.

Following the Second World War, as the United Nations was coming together in an atmosphere charged with universal horror at the memory of the fifty million people who had been lost in that conflict, a commission chaired by Eleanor Roosevelt set out to codify the human rights that were already recognized & aspired to by civilized nations. The resulting Universal Declaration of Human Rights, which was passed unanimously by the General Assembly in December of 1948 (and which should be as familiar to Americans as our own Bill of Rights, though most of us know very little about it) asserts in its Article 3 that "Everyone has the right to life, liberty, & security of person" & in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The framers of the Declaration intended that this language might help lay the ground among other things for a universal rejection of capital punishment; & the document did indeed contribute greatly to undermining the remaining support for that practice around the world. Since 1948, most countries have abolished the death penalty for ordinary crimes, including murder. Some of these have abolished the practice altogether, while others have retained it for high crimes such as treason, espionage or crimes committed in times of war. Still others such as Belgium are "de

facto” abolitionists who retain the punishment in their law books but have not made use of it for ten years or more.

With the addition to the list of abolitionist countries of Germany in 1949, Great Britain in 1970 & France in 1981, the pattern of a new approach to the administration of criminal justice was pretty much complete for Western Europe & Latin America. Abolition in Great Britain was accomplished through the leadership of the Queen, the House of Lords & the Anglican Bishops in addition to a wide array of activist groups, in the face of overwhelming public support for the death penalty. Support for the reinstatement of capital punishment has risen as high as 80% in that country during the years since it was abolished, but the government has never yielded to that demand – not even under Conservative Prime Minister Margaret Thatcher, or in the presence of a constant terrorist threat from the IRA. Under the influence of Great Britain’s highly principled reform, moreover, the countries of the British Commonwealth have for the most part since fallen in line. Australia, New Zealand & Canada abolished capital punishment during the 1970s & 80s, so today our neighbors both north & south as well as our principal allies in world affairs are all countries that live free of the barbarous custom, & have a hard time squaring the actual judiciary practice of the US with its perennial claim to world leadership in the exercise of human rights.

Progress in this worldwide struggle has been steady since the Second World War, but not without its ups & downs. When the International Covenant on Civil & Political Rights was being drawn up painfully & haltingly during the 1950s & 60s (it finally went into force in 1976), explicit exceptions to the emerging human rights standard had to be made for capital punishment, so as to accommodate the US & other countries that were reluctant to let it go. The Covenant did succeed with some difficulty in banning the execution of pregnant women, of senior citizens over 70 & most notably of children under 18 (something still allowed in several American states, & in only a few other places around the world, & which was the subject of a “reservation” imposed over vigorous objections from Sweden & other countries before the US would agree to sign the document). The Covenant managed despite our representatives to include a few

procedural restrictions on executions; & it enshrined for future use the important principle that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The Second Optional Protocol to the Covenant, not embraced by the US, goes so far as to call for the abolition of the death penalty worldwide -- as do several other documents in the emerging corpus of international human rights law that has drawn up during the 1970s & 80s. In 1994, the General Assembly at last considered (though it ultimately rejected) a call for a worldwide ban on executions of any kind that was to be implemented by the year 2000. In 1998, 1999 & 2000 resolutions were passed urging a worldwide moratorium on the practice, with a view to pushing for complete abolition within an indefinite period of time. In this company, the US is clearly way out of step.

Meanwhile individual nations have continued to take the pledge. In 1965 only 23 countries had completely abolished the death penalty for peacetime crimes; by 1995 that number was 72 & an average of three nations per year were abolishing the sentence for all crimes. Today some 55% of the world’s 195 countries are completely or “de facto” abolitionist; but the 45% that remain include most of the big ones: China, Russia, the US, India, Japan, Nigeria, Pakistan, Bangladesh, Indonesia, Vietnam, Thailand, the Philippines. So most people still live in “retentionist” countries where they can be executed by the state for the most serious crimes. In the US alone, since the reinstatement of capital punishment by the Supreme Court in 1976, we have put to death close to a thousand persons & have many thousands awaiting execution on Death Row. A disproportionate number of these are poor persons of color; many are mentally handicapped; a few are children under 18; an unknown number are demonstrably innocent of the crimes with which they have been charged. All of these characteristics of the culture of death in our country stand as direct violations of the emerging international standard for human rights.

The great areas of the world in which the abolitionist movement is still not very influential in the formation of state policy are East & South Asia, the Muslim world, & Sub-Saharan Africa. But even there we can see some bright light: post-Apartheid South

Africa has abolished capital punishment; Senegal, Niger, Togo, Burkina Faso & some others apply only sparingly; Japan, Israel & Sri Lanka retain capital punishment but seldom exercise the option. The abolitionist movement is currently showing strong signs of life in Kenya, Tanzania & Zimbabwe, in South Korea, Taiwan & Mongolia; & it though currently swamped by Hindu Nationalism & the conflict over Kashmir, it has been a vigorous presence in India since the days of Mahatma Gandhi.

Our record as a nation in this arena is not to be admired. In the 1990s the US, China, Iran, Saudi Arabia & the Democratic Republic of Congo conducted 85% of all known executions worldwide. China is the leading practitioner of capital punishment, with over 1,000 executions a year & very little regard for what the rest of the world views as the standards for judicial process. Iran & Saudi Arabia follow exceptionally draconian interpretations of Islamic law. The Congo is a state in total disintegration which has lost over 3.5 million people to an interminable civil war fanned by foreign interests with an eye on its natural resources. The US has held on to the practice despite overwhelming evidence that it does not deter crimes of violence, that it is enormously costly to the state, that it frequently condemns innocent people, and that it is irremediably arbitrary and inequitable in its application to different racial, ethnic & socioeconomic groups. During the 1960s we seemed to have gone into a period of de facto abolition which culminated in the Supreme Court's temporary suspension of the practice of capital punishment in 1972. Today, however, the number of executions is on the rise – though the bulk of those actually carried out occur in relatively few states, chief among them Texas, Florida & Virginia.

But it's worth reminding Americans that there is a long history of spirited opposition to the practice of capital punishment in this country, that many religious bodies seek its abolition, & that twelve individual states have themselves long since joined in the worldwide march towards a universal abolition of the death penalty: Michigan became the first territory in the world to abolish capital punishment for the crime of murder in 1847; Rhode Island did so in 1852; Wisconsin in 1853; Maine in 1876; Minnesota in 1911, North Dakota 1915; Alaska & Hawaii in 1957; Delaware in 1958. West Virginia,

Vermont, Massachusetts, Iowa & the District of Columbia have since joined the throng. Another dozen states (notably New York & Oregon) have abolished the death penalty at one time or another, only to reinstate it after a particularly heinous crime or two has riled public opinion after vigorous fanning by politicians & the press. But though millions of Americans are still holding on for dear life to the idea that justice can be done and society protected by means of lethal injection administered to exceptionally undesirable persons, & though politicians are persuaded that support for the death penalty, like support for tax cuts or national defense or cheap gasoline, is a surefire formula for victory in the next election, it seems likely that over the long term we too are going to wise up & join the rest of the civilized world in abandoning and then actually abolishing the barbarous practice of state-sponsored human sacrifice.

The US has come under severe criticism for its practice of capital punishment, especially from the European Union countries in their refusal to extradite prisoners to a country where they may be executed, & a series of explicit representations urging the US to join the ranks of abolitionist nations worldwide. The most uncomfortable example may be that of the report that was drawn up in 1998 by Bacre Wale Ndiaye, a Senegalese lawyer from the UN Human Rights Commission, who conducted a study on the ground here in this country (though many public officials refused to cooperate with him), & found contemporary American practice to be a “step backwards in the protection of the right to life.”

Ndiaye noted a tendency to increase the scope of the death penalty, by reinstating it at the state level or increasing the number of aggravating circumstances that justify its application, & by expanding its scope dramatically at the federal level. He particularly singled out the execution of juvenile & mentally retarded offenders in contravention of international law, & took us to task for the “unfairness & arbitrariness” of individual states’ imposition of the sanction, noting that “race, ethnic origin, & economic status appear to be key determinants of who will, & who will not, receive a death penalty.” He recommended a moratorium, a prohibition on the execution of children & the mentally retarded, maintaining what looked like the de facto abolition the execution of women



(since broken by the putting to death of Karla Faye Tucker in Texas), a restriction of the number of offenses that are punishable by death, changes in the way judges are selected & in operation of the states' public defender systems, & programs designed to educate judicial officials about their obligations under international human rights agreements to which the US has subscribed. He also questioned the commitment of the US government to international human rights standards in this area, & suggested that the ratification by the US of the International Covenant on Civil & Political Rights be declared void by the General Assembly.